(2)

No. 90-355

In The

Supreme Court of the United States

October Term, 1990

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

v.

BARBARA A. LUCK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT

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QUESTION PRESENTED

Do the administrative processes of the Railway Labor Act preclude a railroad employee who is not covered by a collective bargaining agreement from pursuing a common law contract and tort action, grounded on a state constitutional privacy provision?

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Respondent Barbara A. Luck respectfully prays that this Court deny the petition for writ of certiorari filed by Southern Pacific Transportation Company on August 28, 1990.

PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

Article I, section 1 of the California Constitution provides in pertinent part:

> All people are by nature free and independent and have inalienable rights. Among these are . . . privacy.

STATEMENT OF THE CASE

In July 1985, petitioner Southern Pacific Transportation Company (hereinafter, "SP") ordered all 507 "exempt" employees (workers not covered by a collective bargaining agreement) in the engineering department to submit without notice to urinalysis to test for drugs, alcohol, or medications. App.[1] 3a. SP had no reason to believe that any of the exempt employees was using drugs or abusing alcohol. RT 797.

At the time of the mass urinalysis, respondent Barbara Luck (hereinafter, "Luck") was a computer programmer in SP's engineering department, an exempt position that she had held for four years. App. 2a, 4a. She had no safety-related duties, a fact admitted by her supervisor. App. 3a-4a, 21a-25a; RT 1656-1657.

Luck refused to submit a urine sample as a matter of principle: "[F]rom my background and understanding of my rights as an American, I felt I did not have to honor such a request for no reason." App. 3a; RT 438. Four days later, SP summarily terminated her for insubordination.

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[1] "App." refers to the appendix to Southern Pacific's Petition for Writ of Certiorari. "A." refers to the appendix to this Opposition to Petition for Certiorari. "RT" refers to the Reporter's Transcript. "CT" refers to the Clerk's Transcript. "Supp. App." refers to the Appendix Supplementing Clerk's Transcript, filed in the California Court of Appeal.

App. 3a. SP admitted that the company did not believe Luck was taking drugs, alcohol, or medication or that her job performance was impaired in any way. App. 3a; RT 2034-2035.

After her termination, Luck's attorney wrote to SP's Assistant Vice President for Labor Relations, stating: "We hereby request that if they exist, you provide us with any and all written grievances, procedures, rules and regulations which apply to her discharge. . . . " Supp. App. 51. Identical replies from the Assistant Vice President and from SP's attorney, Robert Bogason, who is of counsel in this Court, stated that Luck's position was "fully exempt (non-union)" and "[t]here are no written agreement procedures, rules or regulations which apply to the removal or discharge of an employee from an exempt position." Supp. App. 52-53.

REASONS FOR DENYING THE WRIT

The California Court of Appeal's decision that the Railway Labor Act (hereinafter, "RLA" or "the Act") does not preempt a wrongful termination action by an employee not covered by a collective bargaining agreement is consistent with this Court's interpretation of the Act for over 40 years. The Court has uniformly held that the RLA's administrative processes are intended to resolve disputes over collective bargaining agreements, not garden-variety employment contracts. There is no conflict of decisions on this point; no case cited by SP involved preemption of suits by unrepresented employees.

Even if Luck had had access to the RLA procedures, the instant case would fall within a preemption exception for actions seeking to enforce a provision independent of the collective bargaining agreement that provides minimum substantive guarantees to all employees. Finally, this case involves unique facts, affecting few other employees, because SP insisted that Luck, an exempt employee, had no administrative remedies available to her.

I. Railway Labor Act Preemption Applies Only to Employees Covered by Collective Bargaining Agreements.

The California Court of Appeal's holding that state law wrongful discharge suits are preempted by the Railway Labor Act only if the discharged worker was covered by a collective bargaining agreement is consistent with the purpose, language and structure of the Act, as interpreted by this Court for over 40 years.

This Court has repeatedly construed the RLA's references to "agreements concerning rates of pay, rules, or working conditions" (45 U.S.C. § 153, First (i)) to apply to *collective bargaining agreements*, not to individual employment contracts. For example, in *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978), the Court described the purposes of the RLA as follows:

> In enacting this legislation [the RLA], Congress endeavored to promote stability in labor-managment relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee

> *disputes arising out of the interpretation of collective bargaining agreements.* (Emphasis added.)

Accord: *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, 242 (1950) [RLA "extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements"].

This Court's narrow interpretation of the term "agreements" is also evident in its many holdings concerning the National Railroad Adjustment Board. In *Pennsylvania R.R. v. Day*, 360 U.S. 548, 551 (1959), the Court stated that Congress "entrust[ed] an expert administrative board," the National Railroad Adjustment Board, "with the interpretation of collective bargaining agreements." This Court has taken judicial notice that such an expert tribunal is essential because "provisions in railroad collective bargaining agreements are of a specialized technical nature calling for specialized technical knowledge in ascertaining their meaning and application." *Id.* at 553. See *Consolidated Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. ___, 105 L.Ed.2d 250, 267 (1989) [collective bargaining agreements are not ordinary private contracts and are not governed by common-law concepts]; *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257, 261-262 (1965) [Adjustment Board's expertise lies in interpreting bargaining agreements, which are different from private employment contracts]. A centralized agency like the Adjustment Board is also critical to provide a uniform interpretation of bargaining contracts that are national in scope. "The same collective bargaining agreement must be construed with the same need for uniformity of interpretation. . . . " *Pennsylvania R.R. v. Day, supra*, 360 U.S. at

551. None of these considerations applies to individual employment contracts.[2]

The Act's references to "grievances" have also been uniformly construed by this Court to mean disputes arising out of bargaining agreements. 45 U.S.C. § 151a (5), § 153 First, (i). Thus, in *Union Pacific R.R. v. Price*, 360 U.S. 601, 616 (1959), the Court stated that the "RLA's statutory scheme . . . was designed for effective and final decision of grievances which arise daily, principally as matters of the administration and application of the provisions of collective bargaining agreements." *Accord, Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 33 (1957) ["grievances" are "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee"]; *Slocum v. Delaware, L. & W. R.R., supra*, 330 U.S. at 242 ["grievance" equated with "dispute concerning interpretation of an existing bargaining agreement"]. *See Lancaster v. Norfolk & Western Ry.*, 775 F.2d 807, 814 (7th Cir. 1985) ["A 'grievance' is a claim of violation of the collective bargaining agreement. Congress had no

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[2] An Adjustment Board referee, who was dean of the University of Wisconsin Law School, described the Board as "an instrument for making collective agreements work and survive." Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L. J. 567, 598 (1937).

The Adjustment Board is equally composed of representatives of the carriers and the national labor unions. "Each member . . . shall be compensated by the party or parties he is to represent." 45 U.S.C. § 153, First (a)-(c), (g). No member of the Adjustment Board "represents" exempt workers, like Luck, who are not subject to a bargaining agreement.

intention of making a grievance a separate basis for arbitration from disputes over the interpretation or application of the collective bargaining contract"].

The National Railroad Adjustment Board ("NRAB") itself holds that it has no jurisdiction to grant relief to an employee who is not subject to a collective bargaining agreement, despite the Act's broad definition of "employee." 45 U.S.C. § 151, Fifth. As the Adjustment Board stated in a recent decision involving an exempt employee:

> This Board does not have jurisdiction under the Railway Labor Act to entertain claims by employees not covered by a Collective Bargaining Agreement. As has been stated in numerous previous awards, this Board does not sit as a court of equity. The function of this Board is limited to deciding disputes in accordance with the provisions of a controlling Labor Agreement as applied to the facts and evidence in the record. NRAB, Fourth Division, Award No. 4548 (1987) A.1-A.2.

Accord, NRAB, Fourth Division, Awards No. 4668 (1989) and 4513 (1987) A.4-A.10. Such an administrative interpretation is "of great importance, reflecting, as it does, the needs and fair expectations of the railroad industry. . . . " *Pennsylvania R.R. v. Day, supra*, 360 U.S. at 552. It demonstrates that resort to Adjustment Board processes would have been futile here. *See Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 324, 330-331 (1969) [exhaustion of administrative remedies excused if futile].

In sum, certiorari should be denied because the decision of the California Court of Appeal was thoroughly consistent with this Court's interpretation of the Act over

four decades. SP's argument for a "plain-meaning" reading of the statute ignores that lengthy and uniform history.[3]

II. There Is No Conflict in Decisions on the Issue of Whether an Unrepresented Employee's Court Action Is Preempted by the RLA.

Certiorari should also be denied because there is no conflict of decisions on the issue in this case – whether a court action by an unrepresented employee is preempted

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[3] The limited excerpt of the 1926 legislative debates quoted in SP's petition does not detract from the Court's unbroken construction of the RLA, for at least three reasons. First, the views expressed are those of only one legislator. *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 118 (1980). Second, it is difficult to determine whether the debate concerned employees, like Luck, not covered by a bargaining agreement or workers subject to such a contract but not members of the union.

Finally, the quoted comments reflect the then-prevailing view that use of the Act's administrative processes was voluntary, not compulsory. *See, e.g., Union Pacific R.R. v. Price, supra*, 360 U.S. at 609 ["Congress did not . . . in the original 1926 Act create the National Railroad Adjustment Board or make the use of such an agency compulsory upon the parties"]. The 1934 amendments, which established the Adjustment Board, made important changes in that respect. *Id.* at 610-614; accord, *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R., supra*, 353 U.S. at 35-39. Not until 1972, however, did this Court hold that resort to the RLA's administrative procedures was mandatory – but only for "disputes over the interpretation of a collective bargaining agreement." *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 322, 324 (1972). Consequently, comments in 1926 have limited significance on the question of compulsory resort to the Adjustment Board.

by the RLA. SP cites no case holding that preemption applies in this circumstance, and we have found none. The only cases on point are consistent with the decision below in holding that there is no preemption because there is no collective bargaining agreement. *E.g., Mungo v. UTA French Airlines*, 166 Cal. App.3d 327 (1985).

The four cases cited by SP either did not involve preemption, did not involve unrepresented employees, or both. Moreover, two of the decisions are at least 40 years old.

In *Thomas v. New York, Chicago & St. Louis R.R.*, 185 F.2d 614, 615 (6th Cir. 1950), the Sixth Circuit held that a discharged steward who was "not a member of a union" could voluntarily submit his grievance to the Adjustment Board. No issue of preemption was involved, and the court did not make clear whether the employee was simply a non-union member in a union-represented bargaining unit or whether, like Luck, he was an exempt employee not subject to a union contract.

Womble v. Seaboard System R.R., 804 F.2d 635 (11th Cir. 1986) *cert. denied*, 481 U.S. 1051 (1987), was a two-paragraph *per curiam* decision, which affirmed without analysis the dismissal of a "non-union" employee's wrongful discharge action for failure to pursue RLA remedies. Like *Thomas, Womble* did not make clear whether the worker was a non-union member in a represented unit or an exempt employee not covered by a collective bargaining agreement. Of the three cases summarily cited in the decision, two involved unionized employees covered by union contracts. *Andrews v. Louisville & Nashville R.R., supra*, 406 U.S. 320; *Rader v. United Transportation Union,*

718 F.2d 1012 (11th Cir. 1983). The third was *Thomas v. New York, Chicago & St. Louis R.R., supra.*

In *Hodges v. Atchison, T. & S.F. Ry.*, 728 F.2d 414 (10th Cir.), *cert. denied*, 469 U.S. 822 (1984), the court held that preemption applied to a wrongful discharge action by a represented worker who was employed under a collective bargaining agreement, even though the employee did not belong to the union. "Mr. Hodges' employment in the craft governed by the applicable collective bargaining agreement makes him subject to the terms and conditions of employment obtained in the agreement, and the collective bargaining agent was obliged to represent him," the court stated. *Id.* at 417.

Finally, *Elgin J. & E. Ry v. Burley*, 325 U.S. 711 (1945) concerned neither preemption nor unrepresented employees, but rather the authority of a union to compromise and settle the monetary claims of represented employees or to submit them for determination by the Adjustment Board. In dictum, this Court characterized a "minor" dispute under the RLA as a disagreement that

> relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. *Id.* at 723.

As Judge Posner noted in *Lancaster v. Norfolk & Western Ry., supra*, 773 F.2d at 814, "If this dictum were an accurate statement of the law, . . . all personal injury claims by railroad workers against their employers would

be within the exclusive jurisdiction of the arbitration tribunals set up under the Railway Labor Act – something no one believes." This Court agreed with Judge Posner in *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557 (1987), holding that personal injury claims under the FELA are not preempted by the RLA.

The Court quoted the *Burley* dictum in *Consolidated Rail Corp. v. Ry. Labor Executives' Ass'n, supra*, ___ U.S. ___, 105 L.Ed.2d at 261-263, when discussing the RLA's distinction between major and minor disputes. The Court stressed that, whether a dispute is major or minor, it must still involve a collective bargaining agreement. Thus, the *Burley* dictum, unclear in 1945, has lost any remaining significance in the intervening half-century.

III. Preemption Is Inapplicable Because the Instant Case Is Based on a State Constitutional Provision Which Provides Minimum Substantive Guarantees to All Workers.

Certiorari should be denied because, even if Luck had had access to RLA remedies, this case would fall within an exception to preemption developed by this Court for actions which seek to enforce minimum substantive guarantees provided to *all* employees.

The Court has repeatedly held that the preemption doctrine does not preclude unionized workers from bringing court actions to enforce federal or state substantive rights available to all workers. Indeed, just three years ago, in *Atchison, T. & S.F. Ry. v. Buell, supra*, 480 U.S. at 565, the Court held that an injured railroad employee's action under the Federal Employers' Liability Act was not

preempted by the RLA because the FELA provides "substantive protection against negligent conduct that is independent of the employer's obligations under its collective bargaining agreement. . . . " *Accord, Lingle v. Norge Division of Magic Chef*, 486 U.S. 399 (1988) [no preemption of union worker's retaliatory discharge action under state workers' compensation statute; no interpretation of union contract required]; *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 737 (1981) [no preemption where employee's claim based on Fair Labor Standards Act, which provides "minimum substantive guarantees to individual workers"].

Luck's action was bottomed on the California Constitution's privacy provision, which expressly protects the privacy of "[a]ll people." Cal. Const., art. I, § 1; App. 12a, 29a. Thus, certiorari should be denied because the decision of the California Court of Appeal is consistent with a well-established exception to preemption.[4]

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[4] This preemption exception has repeatedly been applied under the Railway Labor Act, frequently in cases involving SP. *E.g., Evans v. Southern Pacific Transportation Co.*, 213 Cal. App.3d 1378, 1382-1388 (1989), *cert. denied*, ___ U.S. ___, 110 L.Ed2d 661 (1990) [race and handicap discrimination claim not preempted because not "inextricably intertwined" with matters subject to collective bargaining agreement]; *Hollars v. Southern Pacific Transportation Co.*, 792 P.2d 1146, 1150 (N.M. App. 1989), *cert. quashed*, ___ N.M. ___ (1990) [tort claims not preempted under *Lingle*]; *Quinn v. Southern Pacific Transportation Co.*, 76 Or. App. 617, 711 P.2d 139, 143-144 (1985) [handicap discrimination claim not preempted because based on independent statutory right, not on collective bargaining agreement].

IV. The Outcome of This Case Depends on its Special Facts, Which Will Affect Few Other Litigants.

The unique facts of this case make the grant of certiorari inappropriate.

In response to the inquiry of Luck's attorney concerning "any and all written grievance procedures, rules and regulations which apply to her discharge," SP's Labor Relations Vice President and its attorney both stated that none existed because Luck's job was "fully exempt (non-union)." Supp. App. 51-53. Not until long after this action was filed did SP do an about-face and contend that Luck should have exhausted administrative remedies under the RLA. CT 404-410.

SP's conduct amounted to a repudiation of the RLA's administrative procedures and estops SP from relying on the allegedly unexhausted procedures as a defense to her action. *Vaca v. Sipes*, 386 U.S. 171, 185 (1967). Because of these unusual facts, which will affect few other litigants, certiorari should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 4548
Referee Herbert L. Marx, Jr. Docket Number 4568

PARTIES TO DISPUTE: John P. Leary, Jr.
Consolidated Rail Corporation

STATEMENT OF CLAIM:

Unjustified abolishment of my non-agreement Pricing Analyst position in the Marketing & Sales Department on March 2, 1982.

OPINION OF BOARD:

On February 5, 1982, Claimant was notified by letter that his non-agreement position as Pricing Analyst in the Carrier's Marketing and Sales Department was being abolished with the close of business on March 2, 1982. The Claimant contends that the job abolishment was not justified and seeks reinstatement to the position as well as backpay and other benefits which allegedly were lost to the Claimant as a result of the job abolishment.

As noted above, at the time of Claimant's job abolishment, he was employed in an exempt non-agreement position. The Claimant did not occupy that position as a matter of any contractual right arising from a Collective Bargaining Agreement, nor has the Board been requested to interpret the provisions of any such Agreement. This Board does not have jurisdiction under the Railway Labor Act to entertain claims by employes not covered by a Collective Bargaining Agreement. As has been stated in numerous previous Awards, this Board does not sit as a court of equity. The function of this Board is limited to

deciding disputes in accordance with the provisions of a controlling Labor Agreement as applied to the facts and evidence in the record.

The Carrier raises additional procedural and substantive defenses to the Claim which this Board need not reach in view of the finding that the Board is without jurisdiction to hear the dispute.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute waived right of appearance at hearing thereon.

AWARD

Claim dismissed.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

/s/ Nancy J. Dever
Nancy J. Dever
Executive Secretary

Dated at Chicago, Illinois, this 21st day of May 1987.

APPENDIX 2

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award No. 4668
Docket No. 4694
89-4-88-4-37

The Fourth Division consisted of the regular members and in addition Referee William F. Euker when award was rendered.

PARTIES TO DISPUTE: (Earl C. Wilson
(
(CSX
(Transportation, Inc.

STATEMENT OF CLAIM:

1 – *Wrongful discharge,* from my non-contract employment with CSX Transportation as a result of a "purported CSX Workforce Reduction Program".

2 – That my position *was not eliminated.*

3 – That actions taken by CSX's "Distribution Services Group" *failed to comply with specific procedures* as outlined by Mr. John W. Snow, President and Chief Executive Officer, CSX Transportation Company.

4 – That my position was filled by a less qualified *"railroad"* employee and subsequently his position filled by a *"non-railroad"* individual.

5 – That *contrary* to the stated "reduction of positions, and or employees", has resulted with the engagement of more *"non-railroad"* employees, under a questionable subsidiary company, as defined by the

Interstate Commerce Commission, *to perform functions that previously were performed by railroad employees.*

6 – That because of the wrongful actions, as cited above, *I am seeking reinstatement* to my former position *with return of lost wages and benefits,* retroactive to February 1, 1988, when wages and benefits were wrongfully halted, *less unemployment compensation* received from the Railroad Retirement Board.

FINDINGS:

The Fourth Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

This is a claim in behalf of a non-contract employe [official] who contends his employment rights were violated when, as a result of reduction in force, his position was allegedly eliminated and he was requested to elect one of several options made available to that class of employes to be exercised prior to December 31, 1987. The Claimant also held seniority as a Clerical employe, however his rights in that class are not involved in the present dispute.

From October 1, 1978, the Claimant has maintained a non-contract position with the Carrier and was given various titles reflecting his management status and responsibilities. On June 15, 1987, the Carrier advised its non-contract employes that it was implementing a decision to "downsize" its non-contract work force, institute a hiring freeze and place a moratorium on general salary increases during 1987. Some of these cost reduction policies were also planned for subsequent years. The Claimant was notified by letter dated November 13, 1987, that his non-contract employment with the Carrier would end on December 31, 1987, as part of the Carrier's Workforce Reduction Program.

Briefly, the Claiment was given the option of a voluntary separation with one year's pay; remain on the payroll for one year; receive a pension benefit of five additional years of credited service and five additional years of age under the pension plan; exercise his seniority rights and be reimbursed for moving expenses; or be considered for available vacancies in other CSX companies, in which event, if moved to a new location, the non-contract relocation policy would apply.

The record does *not* show that Claiment accepted any one of the options listed above, but instead insisted on being retained in the Carrier's service on his former position or a position of comparable status. The claim progressed to the Board, for wages and benefits lost, is so framed.

The Carrier has at least two strings to its jurisdictional bow in defense of the claims. First, it asserts the Claimant is not an "employe" as that term is defined in

Section 151, Fifth, of the Railway Labor Act; consequently he has no standing to bring a dispute before the N.R.A.B. Secondly, it contends Claiment is a non-contract employe and the provisions of Section 153, First, (i) of the Railway Labor Act only apply and grant jurisdiction in those cases involving disputes "growing out of grievances or out of the interpretation or application of agreements;" therefore the Board would have no statutory authority to consider the case in either event.

The parties to the dispute have proffered Awards relative to the issues discussed above. Based upon our careful review of those decisions, we find that this Board has no jurisdiction in this matter. See Fourth Division Awards 4548, 4513, 4510, et al. In Fourth Division Award 2511, the Board decided:

> "In order for this Board to hold that claimant's termination was improper it would be necessary to find that Carrier violated an enforceable limitation on its otherwise unrestricted right to terminate employees with or without cause. But there was no contractual limitation on Carrier's right to terminate claimant, since his employment was not covered by any agreement. Moreover, the Railway Labor Act, which is the source of the Board's authority, does not contain any restriction on Carrier's right to hire or discharge employees. The Board is without authority to establish such a restriction by its own independent action. The claim therefore must be dismissed."

In addition, there is a serious question whether Claimant was an "employe" within the meaning of Section 151, Fifth, of the Railway Labor Act. See Fourth Division Awards 4276 and 14.

The Petitioner endeavors to bar the application of the foregoing principles by alleging that he was advised to submit his dispute to this Board by persons at the Interstate Commerce Commission, the National Mediation Board and the National Railroad Adjustment Board. Needless to say, even if the Claimant's representations are accurate, advice that a party may file a dispute does not commit the tribunal involved to a finding that it has jurisdiction to decide the merits. The Board cannot consider whether it has jurisdiction until a party attempts to invoke it. Where that authority is found wanting under the statute, it has no alternative but to dismiss the claim.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

Attest: /s/ Nancy J. Dever
Nancy J. Dever Executive Secretary

Dated at Chicago, Illinois, this 16th day of February 1989.

APPENDIX 3

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 4513
Referee Herbert L. Marx, Jr. Docket Number 4520

PARTIES TO DISPUTE: Lawrence A. McCabe
Consolidated Rail Corporation

STATEMENT OF CLAIM:

Unfair labor practices against me by Conrail.

OPINION OF BOARD:

Claimant was employed by the Carrier in a series of non-agreement management positions until 1981. He was then placed in a clerical position, represented by the BRAC Organization. This change was made, according to the Carrier, based on "reductions . . . in the work-force" of the Carrier.

The various claims and allegations made by the Claimant do not appear to concern violation of any BRAC Agreement in reference to his service in a clerical position. Rather, the claims and allegations concern the Claimant's perception of unfair treatment in 1981; and thereafter in reference to retention or placement in a management position. There is no sanction for this Board to concern itself with matters involving non-agreement management positions. As provided in Section 3, First (i) of the Railway Labor Act, the Board is concerned only, as to individuals, with "disputes between an employee . . . and a Carrier . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions. . . . "

The allegations made by the Claimant thus have no standing for review by the Board.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute were granted the privilege of appearing before the Division, with the Referee sitting as a member thereof, to present oral argument.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division.

ATTEST:

/s/ Nancy J. Dever
Nancy J. Dever
Executive Secretary

Dated at Chicago, Illinois, this 26th day of March 1987.